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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 187

JOEL A. MALOY AND RUTH MALOY, HIS WIFE,
Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, A CORPORATION EXISTING UNDER THE LAWS OF THE UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

WOOD & COBB, ESQS.,
Attorneys for Respondent,
232 South County Road,
Palm Beach, Fla.

JOEL A. MALOY and RUTH MALOY,
His Wife, in Proper Person,
105 S. E. 4th Avenue,
Delray Beach, Fla.,
Petitioners.

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PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Joel A. Maloy and Ruth Maloy, his Wife, in proper person, respectfully shows unto this Honorable Court:

I. Opinions of the Courts Below

1. Order for Summary Final Decree and Summary Final Decree of the 15th Judicial Circuit of Florida in and for Palm Beach County. Order denying Petition for Rehearing. (R. 25, 27, 41).

2. Opinion of District Court of Appeal of Florida, Second District, one word "affirmed". Order denying Petition for Rehearing: *Maloy* v. *First Federal Savings &*

Loan Association of West Palm Beach, 107 So. 2nd 405 (R. 49, 60).

3. Order of Supreme Court of Florida, denying Petition for Writ of Certiorari to District Court of Appeal. *Maloy* v. *First Federal Savings & Loan Assn.*, 109 So. 2nd 574 (R. 22, copy attached).

II. Grounds of Jurisdiction

1. Supreme Court of Florida has sanctioned so far a departure from the accepted and usual course of judicial proceedings by a lower court as to call for this Court's power of supervision, under Federal and State Constitutional guarantees of trial by due process of law. Trial Court granted Motion for Summary Final Decree to which is attached photostatic copy of an "account card" and an affidavit as to failure to pay installments due on it and pursuant to rules for payment, not the promissory note and mortgage sought to be foreclosed and an affidavit as to failure to pay installments due thereon and in accordance with provisions thereof.

2. Date and entry of Order of Supreme Court denying Petition and final judgment, is February 4, 1959. This Honorable Court on May 6, 1959, entered Order extending time for filing Petition for Certiorari to and including July 4, 1959.

3. It is believed that Section 1257 (2) of 28 U. S. C. sustains the jurisdiction of the Supreme Court of the United States.

III. Question Involved

Where defendants alleged in mortgage foreclosure complaint to be in default for failure to pay installments due on promissory note secured by mortgage sought to be foreclosed and of taxes are proved found and held to be in default for failure to pay installments due on plaintiff's "account card" and pursuant to its rules for payment, did they receive a fair and impartial trial under the due process

of law guaranties of our Federal Constitution and the Constitution of the United States?

IV. Constitutional Provisions Involved

1. Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U. S. C. Const. Amend. XIV Sec. 1.

2. Constitution of the State of Florida.

"All courts of this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay." Declaration of Rights, Sec. 1. F. S. A. Vol. 25 p. 518.

V. Concise Statement of the Case

Joel A. Maloy and Ruth Maloy executed on February 15, 1956 the promissory note secured by mortgage sought to be foreclosed, and paid installments due 20th of each month until book furnished showed excess $4,276.30 balance after payment of April 20, 1957, paid by check inadvertently dated April 30, instead of $4,255.01.

Complaint filed August 15, 1957 and paragraph 2 alleges:

"(2) The defendants, Joel A. Maloy and Ruth Maloy, his wife, have not paid any installments due on the said promissory note since May 1, 1957 when they paid the

installment due April 20, 1957. The said defendants also did not pay taxes for 1956 on the mortgaged property due to the City of Delray Beach * * *." (R. 1. Copy note and mortgage R. 3)

Answer of defendants filed October 28, 1957 denies paragraph 2. And there stands uncontradicted affirmative defenses of no defaults, plaintiff demanding installment payments due on "account card" to its advantage and taxes not paid having been tripled, paid to compel payment. Vice President Campbell threatening foreclosure in letter of June 7 unless May 20th paid on account, advised taxes paid June 3. And in letter of July 9 threatening to send the "account to our attorneys" for collection and possible foreclosure, advised $4,276.30 is balance due on "account card" and of rules for payment said: "The method of posting used by the Association follows these two rules among others, * * *." Exhibits "C" and "D". (R. 7, 15 and 17).

Motion for Summary Final Decree of plaintiff filed Nov. 18, 1957 on ground there is no genuine issue as to any material fact, as complaint alleges default and defendants admit failure to pay installments due on the "account card" states:

> "(4) * * *. Attached is a copy of the *account card* from plaintiff's records *pertaining to this account* and an affidavit * * *. An examination of the affidavit and account card shows the balance of the account as of May 1, 1957 was in fact $4,276.30". (R. 30)

And the affidavit attached avers:

> "* * *; attached is a copy of the *account card* from the Association's records *pertaining to the account of Joel A. Maloy and Ruth Maloy his wife;* that said copy

shows the status and history of the said account from its inception * * *; Affiant further says that the balance of the account as of May 1, 1957 * * * was $4,276.30." (R. 20)

(Account Card shows interest on interest charges of $21.39 and $21.50 on April 30 and May 1, 1957. R. 21)

Defendants' Motion for Summary Final Decree filed Nov. 27, 1957 on ground there is no genuine issue as to any material fact, defendants entitled to Summary Final Decree as a matter of law. (R. 22)

Order for Summary Final Decree dated Jan. 8, 1958, the Court finding: There is no genuine issue as to any material fact. Defendants in default for failure to pay "any installments of said promissory note subsequent to the installment due April 20, 1957" and "1956 taxes due to the City of Delray Beach". Defendants admit failure to make payments due on the account,

> "The Court has examined the affidavit made by the Treasurer of plaintiff and attached copy of the *plaintiff's account card pertaining to this mortgage* and finds no error in the calculations,"

and plaintiff entitled to Summary Final Decree as a matter of law, granted its Motion and denied defendants'. (R. 25)

Summary Final Decree dated and entered Jan. 8, 1958 orders sale of property if sums found due not paid within 21 days. (R. 27).

Constitutional Question sought to be reviewed was raised in the Circuit Court by Petition for Rehearing filed Jan. 17, 1958 on the ground the Court departed from the accepted and usual course of judicial proceedings. States defendants signed promissory note not an "account card" its use to plaintiff's advantage. (par. 1 and 2, R. 29-34). That

defendants required to pay on note and in accordance with its provisions cannot be required to pay on "account card" and pursuant to its rules or for failure held in default for failure to pay installments due on note or taxes paid to compel payment. (par. 3 and 4, R. 35-37). Order dated Jan. 24, 1958 denied Petition and "ratified and confirmed" Order and Decree entered. (R. 41).

And in the District Court of Appeal by Assignments of Error filed March 6, 1958 on the ground the Court departed in its findings: States Court erred in finding default for failure to pay on "copy of something plaintiff refers to as an account card" and affidavit "in complete and utter disregard of note and its provisions". (No. 1; R. 42). In finding plaintiff entitled to Summary Final Decree as a matter of law on mere statements in Motion of default and there no proof nor attached note and affidavit as to default for failure to pay either installments due on note or taxes and instead the said "account card" and affidavit as to purpose and use of the same. (No. 7, R. 45). Erred in interpretation of facts and law. (No. 16, R. 49). Opinion dated Sept. 19, 1958 of one word affirmed trial court. (R. 49).

Also by Petition for Rehearing filed Oct. 3, 1958 on the ground Constitutional rights denied, State and Federal. States it is believed Court through oversight affirmed lower court, record showing no proof of default as required by law. (par. 1, R. 50). That allegations in complaint not proved nor promissory note and mortgage offered in proof of failure to pay installments due or taxes in accordance with provisions thereof. (par. 1(b) R. 50). That not in default yet held in default and their property ordered taken from them.

> "Petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of

Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law and right and justice shall be administered without sale, denial or delay.'

And the Constitution of the United States, Amendment XIV Section 1 providing: '* *; nor shall any state deprive any person of life, liberty or property without due process of the law.' '' (par. 2, R. 53).

Order dated Oct. 28, 1958 denied without Opinion. (R. 58).

And in the Supreme Court on ground Constitutional rights denied, by Petition for Certiorari filed Dec. 26, 1958. States the record shows petitioners not proved and found in default as required by law, their property ordered taken from them, having been held in default.

''That petitioners have been denied their inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing: 'All courts of this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy in due course of law.'

And the Constitution of the United States, Amendment XIV, Section 1 providing: '* * nor shall any state deprive any person of * * property without due process of the law.' '' (par. 4(i) R. 17)

Order dated February 4, 1959 denied without opinion. (R. 22).

Notice of Appeal to Supreme Court of the United States filed in District Court of Appeal Second District, April 30, 1959. (R. 61).

VI. Reasons Relied on for the Allowance of the Writ

1. That the decision of the Supreme Court of Florida contrary to the due process clause of the Constitution of the United States.

2. That the denial of petitioners' Motion for Summary Final Decree was a denial of rights guaranteed under the Constitution of the State of Florida, under Section 4 of the Declaration of Rights.

3. That the holding of default for failure of a mortgagor to pay installments due on promissory note secured by mortgage sought to be foreclosed and for failure to pay taxes, was a denial of a fair and impartial trial, under the laws and the Constitution of the State of Florida and the United States, under the facts of this case.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the District Court of Appeal of Florida, Second District, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case Numbered and entitled on its docket No. 523 Joel A. Maloy and Ruth Maloy, his wife, appellants vs. First Federal Savings and Loan Association of West Palm Beach, appellee and that the said Final Judgment of the Supreme Court of the State of Florida may be reversed by this Honorable Court, and your petitioners may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioners will ever pray.

JOEL A. MALOY,
RUTH MALOY,
Petitioners.

IN THE SUPREME COURT OF FLORIDA

January Term, A.D. 1959

Wednesday, February 4, 1959

JOEL A. MALOY AND RUTH MALOY, HIS WIFE, PETITIONERS

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a corporation existing under the laws of the United States of America, RESPONDENT.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the Order of the District Court of Appeal of Florida, Second District, in said cause bearing date of September 19, 1958, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy.

Test.

s/ GUYTE P. MCCORD,
Clerk Supreme Court.

(Supreme Court Seal)

(6285-1)